No. 89 - 1693

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

John E. Norton,
Petitioner

v.

Paul C. Nicholson, Frank G. Benak,
Lois J. Fleming, and The
Village of Western Springs,
Respondents

On Petition For a Writ of Certiorari
to the Illinois Appellate Court

Petitioner's Reply Memorandum

John E. Norton
3917 Grand Avenue
Western Springs, Illinois
60558
(708) 246-4692
Petitioner, Pro Se

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous:

INTRODUCTION

Pursuant to S.Ct. Rule 15.6, the following memorandum addresses arguments first raised by the respondents in their May 29, 1990 Opposing Brief in No. 89-1693.

Additionally, petitioner wishes to correct a numerical reference error on page 3 of his petition, under the heading of HOW THE FEDERAL QUESTIONS WERE RAISED. The third sentence therein contains a mistaken reference to 28 U.S.C. §1983. This should be changed to read 42 U.S.C §1983.

ARGUMENT

In their Opposing Brief (on p. 1), the respondents claim outright that the petitioner misstates the facts of this case, going well beyond what is contained in the the record. And yet the respondents do not substantiate their claim with specific references of error. While it is impossible to respond definitively to an unspecified allegation of misstatement, the petitioner can and does emphatically state that this Court will find that the facts articulated on pages 4-17 of his petition were contained within the following portions of the record:

> The petitioner's Third Amended Complaint (and restated in his proposed Fourth Amended Complaint) as filed in the Circuit Court of Cook County, Illinois (pp. 45a-62a and 62a-69a respectively of the appendix attached to the Petition).
>
> The three volumes of exhibits attached to the Third Amended Complaint and proposed Fourth Amended Complaint [**R.C.117-456**].
>
> The Illinois Appellate Court's ruling as reported at 187 Ill.App.3d 1046, 543 N.E. 1053 (pp. 1a-17a of the appendix attached to the Petition).

The facts averred in this case are those alleged in the petitioner's Third Amended Complaint and its attached exhibits. The respondents, in their motion to dismiss that Third Amended Complaint, under section 2-615 of the Illinois Code of Civil Procedure, admitted those facts to be true as alleged. Furthermore, the petitioner's statement of the facts in his petition were substantially the same as recounted to both the Illinois Appellate Court and the Illinois Supreme Court, and the respondents never once objected to the petitioner's statement of the facts. To do so now, for the first time,before this high Court, without specificity is not only unfounded, but also highly inappropriate.

The petitioner stands on his statement of the facts. The truncated version by the respondents, in their opposing brief, omits many of the pertinent facts alleged in the Third Amended Complaint; but in particular the following three significant facts need to be reinserted and re-emphasized:

1) That the respondents specified in writing that the petitioner could discuss or question fire department policies, provided he did so through either the Fire Chief or the Assistant Fire Chief (item #4 of **R.C. 412**, reprinted on p.32**a** of the appendix attached to the petition)—as alleged in ¶4 of Count V of petitioner's Third Amended Complaint (p. 56**a** in the appendix of the petition).

2) That the petitioner requested advice and permission from the Assistant Chief, and received his prior approval to submit a critical memorandum in January 1985 (**R.C. 427**)—as alleged in ¶¶ 3-5 of Count V of petitioner's Third Amended Complaint (pp. 55**a**-56**a** in the appendix of the petition).

That the Village Manager denied the petitioner's written request for an appeal hearing, after his termination in February 1985 (**R.C. 440-441**), despite the Village Personnel Manual's stipulation that such a denial is not discretionary (**R.C. 150-151**)—as alleged in ¶¶ 6-8 of Count V of petitioner's Third Amended Complaint

(pp. 56a-57a in the appendix of the petition).

Additionally, the respondents raise new issues with the truncation and misstatement of cases they cite in the argument section of their opposing brief.

On pages 20-23 of the argument section of their opposing brief, the respondents insist that the context of prior criticisms by petitioner demonstrates that his memoranda of July 1984 and January 1985 were of a personal nature and not protected speech on matters of public. However, as *Monsanto v. Quinn* (674 F.2d 990, 3rd Cir. 1982, at 999) emphatically states, speech does not lose its protection merely because it was persistent. *Arguendo,* nor is it stripped of its first amendment protection because it "irritates" or "harasses" (*Peacock v. Duval*,694 F.2d 644, 9th Cir. 1982, at 647). Furthermore, the content of those prior criticisms (*eg.* safety concerns, equipment and tactical deficits, conformance with State regulations, etc.—see **R.C. 404-405**) deal with issues of public concern and not private grievances that affected the petitioner. Finally, all of these criticisms were either specifically requested of petitioner by Chief Benak or given within context of a typical Monday night postdrill group session "open" to "frank discussion" from anyone on the department (analogous to "open meeting" of *Bickel v. Burkhart*, 632 F.2d 1251, 5th Cir. 1980, cited by the respondents on pp. 23-24 of their brief).

On pages 26-27 of their brief, the respondents cite *Germann v. City of Kansas City* (776 F.2d 761, 8th Cir. 1983) as pertinent to the application of the *Pickering* "balancing test" to the case at bar. However, the facts in that case are totally distinguishable as indicated by the following:

> The employee in *Germann* was an officer (Captain), relatively high in the chain of command.
>
> The letter he wrote consisted of no substance other than personal attacks on the Fire Chief and was mailed to city officials as well as fire department officials.

> There was no actual discipline of either suspension or dismissal, but rather a discretionary matter of non-promotion to a higher management position in the department as an assistant to and directly below the Fire Chief.

The major rationale in the *Germann* Court's decision was:

> Here..., because close supervision of a battalion chief by the fire chief was impossible, personal loyalty to the chief was critical to the management structure of the fire department.... 'Cohesive operation of management is dependent on the loyalty of inferior management.' (at 765)

Likewise, the truncated "interest in maintaining morale and discipline" cited by the respondents from *Hughes v. Whitmen* (714 F.2d 1407, 8th Cir. 1983) was held by that court to be an "impartial" and "nonpunitive" transfer of a police officer in order to resolve an actual ongoing morale problem involving actual disruption and disharmony within an entire division of the police force, and not related to the individual's exercise of free speech (at 1420-14521, emphasis added). This holding is hardly relevant to the punitive suspension and termination of the petitioner for his memoranda to his superiors—in the case at bar--which resulted in no demonstrated morale problem, no disruption or disharmony within the Western Springs Fire Department.

The respondents similarly truncate the findings in *Hall v. Ford* (856 F.2d 255, D.C. Cir. 1988) on pages 31-32 of their brief. The *Hall* court carefully stipulated that "reasonable inferences of harm from the employee's speech" rather than requiring "objective evidence of concrete harm" are allowable when the applying the Pickering balance in cases involving "high-level Policymakers," as compared to the more stringent burden of proof with low-level, nonpolicymaking employees (at 261, citing *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, at 2900). This is far removed from the situation in the case at bar where the petitioner was a fire fighter at the very bottom of the 5-level chain of command in a nonmanagement role, with his criticisms leveled at the Fire Chief and Assistant Chief at the very administrative top of that chain--which

"should be followed in all cases" (See diagram of chain of command structure from section 1-3-1 of Western Springs Fire Dept. Rules & Regulations, reprinted on p. 42a of appendix in petition).

It is factually significant that the petitioner was separated from the Chief and Assistant Chief by the chain of command (pursuant to *Wulf v. City of Wichita*, 883 F.2d 842, 10th Cir. 1989, at 861). The petitioner's criticisms did not impact his immediate supervisors (lieutenants) nor his coworkers (other fire fighters), as specified in *Pickering* (391 U.S 563, 88 S.Ct. 1731, at 1735-1737).[1] The respondents' contend (on pp. 28-29 of their brief) that there was a necessarily close relationship between petitioner as fire fighter and respondent Chef Benak as department head, since the agency is a small suburban fire department. This contention is contrary to fact (the fire department was and still is an average size suburban fire department in Illinois, with between 35 to 40 personnel and 6 pieces of apparatus, and has a strict 5-level chain of command structure)

As stressed in *Melton v. City of Oklahoma City* (879 F.2d 706. 10th Cir. 1989, at 715-716), "although we recognize the potential impact that [statements] may have on the department, we must point out that the government must introduce evidence of an actual disruption of its services resulting from the speech at issue" (citing *Rankin v. McPherson*, at 2899, emphasis added). The *Melton* Court went on further in a footnote (f.n.#11, at 716) to explain:

> ...[W]e are not creating a new rule nor are we increasing the quantum of proof which the government must carry. We merely recognize what we believe to be an obvious *Pickering* requirement that the government show some ascertainable damage to its functioning as a result of the challenged speech. In our view the government cannot prevail in a *Pickering* balance by merely relying on unsubstantiated allegations of disruption. (citations omitted,

[1] Respondents seem to equivocate "co-workers" and "superiors"; also "immediate supervisors" and "high-level superiors."

emphases in orginal)

Lastly, the respondents cite *Connick v. Meyers* (461 U.S. 138, 103 S.Ct. 168) as holding that employers "need not allow events to unfold to the extent that the office is disrupted and working relationships are destroyed before taking action" (pp. 31-32 of their brief). However, it must be noted that in *Connick* there was evidence of actual "events" of disruption in the agency caused by employee's distribution of the questionaire/survey aimed at her immediate supervisors in that case (*Connick*, at 1693). What "events" and/or what "working relationships" are the respondents referring to in the case at bar? What "events of disruption" and/or what "destruction of working relationships" were the respondents attempting to prevent?[2] To date they have not demonstrated any evidence or specific concerns applicable to the "*Pickering* test" that would tip the balance in favor of a governmental interest over that of a low-level employee's free speech rights—as citizen—to critically comment on the fire apparatus response policy of his department. "Even in a police department, the complained-of disruption must be real and not imagined" (*Thomas v. Carpenter*, 881 F.2d 828, 9th Cir. 1989, at 831).

In the same vein, the respondents again cite *Connick* as controlling (on p. 19 of their brief), to substantiate their view that an employer doesn't have to provide "a round table for employee complaints." What the respondents fail to acknowledge is that they themselves provided the "round table" for petitioner's complaints" by stipulating in writing that his wishes to discuss and question departmental orders and policies could be taken up with either the Fire Chief or Assistant Fire (item #4 of Fire Chief's August 17, 1984 directive, R.C. 412, reprinted at 32a in appendix of petition). Furthermore, the content and

[2]At the time, the petitioner was on sabbatical leave from the department because of his "out of town" work on his doctoral residency requirements (he was home for Christmas vacation), and departed the Village a few days after he delivered his January 7, 1985 memorandum to Assiatnt Chief Seivwright, for continued downstate residential work at Illinois State University until May 1985.

form—as well as the time, place, and manner—of that discussion/questioning was given prior approval and encouragement by the Assistant Chief of the Department, who stated that he was open to any input on the specific proposed change in apparatus response policy, and likewise advised the petitioner that it would be proper procedure to write him a memo expressing critical concerns about the proposed change in policy.[3]

Therefore, *Givhan v. Western Line Consol. School Distr.* (439 U.S. 410, 99 S.Ct. 693) is controlling rather than *Connick*.[4] In *Givhan*,the employee—just as in the case at bar—received permission to communicate with her supervisor. This high Court held that when a supervisor "opens the door" to private communication from an employee, he is no longer in a position to argue that he was the "unwilling recipient" of the employee's views (at 696), even if "hostile, "loud," and "arrogant" (at 695). Thus the petitioner's communications in the case at bar could not be considered an "affront to [his] superiors," as contended by the Illinois Appellate Court (at 1061 of its decision, reprinted on p. 16a in appendix of petition), since the respondents repeatedly "opened the door" each time they gave permission when petitioner "knocked" and actually welcomed his "entry." Additionally, in each instance, the petitioner gave at least one week prior notice before "passing through the portal," which certainly gave respondents sufficient time to "bar entry" if they feared a potential for "disruptive events" or "threat to working relationships" to unfold. As stated in *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41, 2nd Cir. 1983, at 46), any potential disruption is minimized when an employee gives such advance notice of intention to communicate critical concerns and

[3] It is also significant that speech occurred in a "zone of privacy," where employee is not on duty or in uniform, not on the premises of the agency, and communicating privately to a fellow employee [Seivwright] considered to be a friend (*Waters v. Chaffin*, 684 F.2d 833, 11th Cir. 1982, at 837).

[4] *Givhan* was cited as distinguishable in *Connick v. Meyers* (461 U.S. 138, 103 S.Ct. 693, at 1691, f.n. 8).

receives permission to do so from his superior.

The petitioner concedes that none of the foregoing precludes the possibility that respondents may eventually prevail in demonstrating sufficient governmental interest in suppressing the petitioner's speech activity. However, the petitioner's contention is that limitation of speech rights of a governmental employee is a serious deprivation of liberty and can only be justified with the constitutional safeguards of due process of an evidentiary hearing. Such due process has been denied by the respondents' refusal to provide administrative post-termination appeal hearing to petitioner as well as by the Illinois Appellate Court's summary dismissal of petitioner's First Amendment claim without having a complete factual record to review. As held in *Porter v. Califano* (592 F.2d 770, 5th Cir. 1979, at 772), a summary dismissal of a First Amendment claim is inappropriate where there are genuine issues of fact. Furthermore,

> it is improper to rely heavily on the investigative findings and conclusions of an interested agency in a case such as this involving delicate and complex matters of an individual's constitutional right against the government, especially where, as here, agency fact-finding procedures were inadequate.[5] (also at 772)

A Court's use of summary judgment judicial review to "rubber stamp" a governmental agency's administrative findings "obscur[es] rights indelibly printed in the Constitution" (at 778). Thus it is necessary to hold a full evidentiary hearing to factually determine the extent, if any, to which employee's speech actually disrupted the governmental agency (at 777).

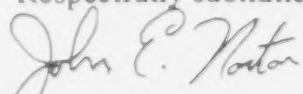
CONCLUSION

For the reasons set forth above, as well as those contained in

[5]Deemed inadequate where record is incomplete, no testimony of superiors is in the record, facts selectively recorded, vague and biased evidence, conflicting evidence, anonymous and inconclusive hearsay (*Porter*, at 777-778).

the original petition, a writ for certiorari should be granted to review the judgment and opinion of the Illinois Appellate Court. In light of the inability of the respondents to face the issues without ventilating all of the facts and distorting case law pertinent to this case, as well as the demonstrated conflict between the Illinois Appellate Court's findings and the holdings of this Court and Federal Appeals Courts, the petitioner respectfully suggests that the need for plenary review of this First Amendment claim should now be obvious.

Respectfully submitted,



John E. Norton
3917 Grand Avenue
Western Springs, Ill. 60558
(708) 246-4692
Petitioner, Pro Se

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